

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1109 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Nos.1 to 5 - No.

JAYSHRIBEN HARILAL PARMAR

Versus

JAYSUKHLAL RATILAL TANK

Appearance:

MR SURESH M SHAH for Petitioner
MR GIRISH S VYAS for Respondent No. 1
PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 22/01/97

ORAL JUDGEMENT

In course of the proceedings in Hindu Marriage Petition No.46/81 the court passed a decree for divorce by way of settlement between the petitioner and the respondent No.1. The petitioner preferred Miscellaneous Application No.296/86 for maintenance under section 125 of the Code. In the course of the said proceeding the petitioner and the respondent No.1 settled the dispute

outside the court. The settlement was produced before the court. The petitioner had agreed to accept monthly maintenance of Rs.190/- from the respondent No.1. In view of the said settlement proceedings were disposed of. However, it must be noted that no order was made by the court in terms of the above-referred settlement.

The petitioner thereafter filed Cri.Misc.Application No.1378/88 for enhancement of the maintenance under section 127 of the Code. The said application was rejected by the learned Judicial Magistrate, First-Class, Rajkot, on 23rd May, 1991. Feeling aggrieved, the petitioner preferred Criminal Revision Application No.46 of 1991 before the learned Additional Sessions Judge, Rajkot which too was dismissed on 8th April 1992. Feeling aggrieved, the petitioner has preferred this petition. Be it noted that as stated hereinbefore, the maintenance was fixed by the petitioner and the respondent No.1 inter se by way of settlement. The learned Judicial Magistrate, First Class, had made no order under section 125 of the Code providing for maintenance to the petitioner. The learned Magistrate, considering this fact has held that since there was no order for maintenance made under section 125 of the Code the petitioner had no right to enhancement of maintenance under section 127 of the Code. Further, the petitioner had alleged that there was an increase in the monthly salary of respondent No.1 and the petitioner was, therefore, entitled to enhancement of maintenance. The learned Magistrate considering the evidence led before it, held that since his divorce with the petitioner No.1 the respondent No.1 had remarried and two children were born to him. Thus, the respondent No.1 had a liability to maintain his wife and children as well as the petitioner. Besides it has been found that there was an increase of Rs.800/- in the salary of the respondent No.1. The learned Magistrate further held that increase in the salary was not such which should entitle the petitioner for enhancement of maintenance.

Section 127(1) of the Code empowers the Magistrate to make such alterations in the allowance as he thinks fit on proof of a change in the circumstances of any person receiving under section 125 a monthly allowance or order under the same section to pay a monthly allowance to his wife, child, father or mother as the case may be. Hence the condition precedent for making alteration in the allowance under section 127 (1) is :

(a) There is a change in the circumstance of any person receiving under section 125 a monthly allowance; (b)

There is a change in the circumstance of any person ordered under section 125 of the Code to pay a monthly allowance.

Thus unless there is a prior order under section 125 of the Code to pay a monthly allowance the same cannot be altered under section 127(1) of the Code. In the present case, the maintenance was determined by the petitioner and the respondent No.1 inter se by a settlement. Though the settlement had been recorded by the learned Magistrate, no order was made by the learned Magistrate in terms of the settlement. Thus, it cannot be said that the petitioner was receiving monthly maintenance under section 125 of the Code or that respondent No.1 was directed under section 125 of the Code to pay a monthly allowance to the petitioner. The learned Magistrate has, therefore, rightly rejected the claim for enhancement advanced by the petitioner. Besides, I do not find any infirmity in the finding recorded by the learned Magistrate and confirmed by the lower court that the increase in the salary of the respondent No.1 was not such which should entitle the petitioner to claim enhancement of the maintenance.

In view of the above discussion, present petition is dismissed. Rule is discharged.
